

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

WAHOO INTERNATIONAL, INC., a
California Corporation,

Plaintiff,

vs.

PHIX DOCTOR, INC., a Florida
Corporation; and DOES 1-10,

Defendants.

CASE NO. 13-CV-01395-GPC-BLM

**ORDER GRANTING
DEFENDANT’S MOTION TO SET
ASIDE DEFAULT**

[Dkt. No. 26.]

I. INTRODUCTION

On November 20, 2013, Plaintiff Wahoo International, Inc. (“Wahoo”) obtained an entry of default against Defendant Phix Doctor, Inc. (“Phix Doctor”). (Dkt. No. 17.) Defendant now moves to set aside the entry of default. (Dkt. No. 26.) Plaintiff filed an opposition and Defendant replied. (Dkt. Nos. 28, 29.) For the reasons set forth below, the Court **GRANTS** Defendant’s motion to set aside default.

II. BACKGROUND

Plaintiff Wahoo is a leading manufacturer of UV cure resins. (Dkt. No. 1, Compl. ¶ 7.) Wahoo owns a federal trademark registration for its UV cure repair resin SOLAREZ, which it has marketed under that name continuously and consistently since June 26, 1989. (*Id.* ¶ 11.) On November 29, 2011, Defendant Phix Doctor, a direct competitor of Wahoo, announced on its website its new product, “Dura Rez.” (*Id.* ¶ 14.) Dura Rez is also a UV cure repair resin in direct competition with Wahoo’s SOLAREZ

1 UV cure repair resin. (Id. ¶ 14.)

2 On December 10, 2012, upon discovering Phix Doctor's use of the name "Dura
3 Rez," Wahoo sent Phix Doctor's principal, Tony Gowen, a cease and desist letter. (Id.
4 ¶ 15.) Phix Doctor continued to market its UV cure resin under the name "Dura Rez."
(Id. ¶¶ 16-19.)

5 On June 14, 2013, Wahoo filed its complaint against Phix Doctor alleging (1)
6 trademark infringement, (2) federal trademark dilution, (3) false designation of origin,
7 (4) injury to business reputation and dilution under California law, (5) common law
8 passing off and unfair competition, and (6) unfair competition. (Id. ¶¶ 6-15.)

9 On September 13, 2013, Phix Doctor principal Tony Gowen filed a letter asking
10 for ten days to prepare a response to Wahoo's complaint. (Dkt. No. 8.) On September
11 17, 2013, Wahoo filed its first request for entry of default. (Dkt. No. 6.) On September
12 19, 2013, this Court issued an Order to Show Cause why default should not be entered
13 for Plaintiff Wahoo due to Defendant's failing to have counsel appear as required of all
14 corporations appearing before this Court pursuant to Civil Local Rule 83.3k. (Dkt. No.
15 10.) On September 27, 2013, Tony Gowen attempted to file an answer and affirmative
16 defense on behalf of Phix Doctor. (Dkt. No. 13.) The Court rejected the document as not
17 in compliance with Local Rules 5.1(a), legibility, and 83.3k, requiring an attorney to
18 appear on behalf of a corporation. (Id.) At the Order to Show Cause Hearing on
19 November 8, 2013, defense counsel appeared on behalf of Phix Doctor, and the Court
20 denied Plaintiff's oral motion to file default against Defendant. (Dkt. No. 15.) The Court
21 also ordered counsel to file his appearance by November 12, 2013. (Id.) Defense counsel
22 failed to file his appearance by November 12, 2013.

23 On November 18, 2013, Wahoo submitted another request for entry of default,
24 (Dkt. No. 16), and on November 20, 2013, the Clerk of Court entered default. (Dkt. No.
25 17.) On November 22, 2013, Defendant, through counsel, attempted to file a Motion to
26 Dismiss for Failure to State a Claim, which was stricken by the Court for non-
27 compliance with the local rules. (Dkt. Nos. 18, 20.) On December 13, 2013, Wahoo filed
28 an ex parte Motion for Leave to Conduct Limited Discovery and for an Extension of

1 Time to File a Motion for Default Judgment, which the Court granted on December 19,
2013. (Dkt. Nos. 22, 23.)

2 On December 20, 2013, Phix Doctor attempted to file a Motion to Set Aside
3 Default, which the Court rejected for non-compliance with the local rules. (Dkt. Nos. 24,
4 25.) On December 30, 2013, Phix Doctor properly filed a Motion to Set Aside Default.
5 (Dkt. No. 26.) On January 31, 2014, Wahoo filed an opposition (Dkt. No. 28), and on
6 February 14, 2014, Phix Doctor filed a reply. (Dkt. No. 29.)

7 **III. LEGAL STANDARD**

8 “Judgment by default is a drastic step appropriate only in extreme circumstances; a
9 case should, whenever possible, be decided on the merits.” Falk v. Allen, 739 F.2d
10 461, 463 (9th Cir. 1984). A court’s discretion to set aside a default is “especially
11 broad” where no default judgment has been entered. O’Connor v. Nevada, 27 F.3d
12 357, 364 (9th Cir. 1994).

13 The court may set aside an entry of default for good cause. Fed. R. Civ. P.
14 55(c). Three factors govern the inquiry into “good cause” under Rule 55(c). United
15 States v. Signed Pers. Check No. 730 of Yubran S. Mesle, 615 F.3d 1085, 1091 (9th
16 Cir. 2010). “Those factors, which courts consistently refer to as the Falk factors, are:
17 (1) whether the plaintiff will be prejudiced, (2) whether the defendant has a
18 meritorious defense, and (3) whether culpable conduct of the defendant led to the
19 default.” Brandt v. Am. Bankers Ins. Co. of Florida, 653 F.3d 1108, 1111 (9th Cir.
20 2011) (citing Falk, 739 F.2d at 463). “This standard, which is the same as is used to
21 determine whether a default judgment should be set aside under Rule 60(b), is
22 disjunctive, such that a finding that any one of these factors is true is sufficient reason
23 for the district court to refuse to set aside the default.” Mesle, 615 F.3d at 1091.
24 However, a district court’s finding that the defendants acted culpably need not
25 “preclude it, as a matter of law, from setting aside [a] default judgment under Rule
26 60(b)(1) based upon excusable neglect.” Brandt, 653 F.3d at 1112.

27 **IV. DISCUSSION**

28 Defendant Phix Doctor argues there is good cause to set the entry of default

1 aside. (Dkt. No. 26 at 6.) Phix Doctor maintains that (1) its conduct was excusable
neglect and therefore not culpable, (2) it has a meritorious defense, and (3) Plaintiff
2 will not be prejudiced by setting aside the entry of default. (Dkt. No. 26 at 6-9.)
3 Plaintiff Wahoo responds that (1) Phix Doctor is more likely attempting to delay
4 judgment, (2) Phix Doctor's alleged defense lacks merit, and (3) Wahoo will be
5 prejudiced by further delay of this case.

6 **1. Defendant's Culpable Conduct**

7 A defendant's conduct is culpable if he has "received actual or constructive
8 notice of the filing of the action and *intentionally* failed to answer." TCI Group Life
9 Ins. Plan v. Knoebber, 244 F.3d 691, 697 (9th Cir. 2001) (emphasis in original).
10 Cases have used "intentional" to mean "willful, deliberate, or evidence of bad faith."
11 See id. The term "intentionally" does not mean the Court can treat a party as culpable
12 "simply for having made a conscious choice not to answer; rather, to treat a failure to
13 answer as culpable, the movant must have acted with bad faith, such as an intention to
14 take advantage of the opposing party, interfere with judicial decisionmaking, or
15 otherwise manipulate the legal process." Mesle, 615 F.3d at 1092 (internal quotations
16 omitted). "Neglectful failure to answer as to which the defendant offers a credible,
17 good faith explanation negating any intention to take advantage of the opposing
18 party, interfere with judicial decision-making, or otherwise manipulate the legal
19 process is not 'intentional' under default cases." TCI Group, 244 F.3d at 697-98.
20 Such conduct is not *necessarily* culpable or inexcusable, although it may be "once the
21 equitable factors are considered." Id.

22 When a defendant "seeks relief under Rule 60(b)(1) based upon 'excusable
23 neglect,'" courts apply the "same three factors governing inquiry into 'good cause'
24 under Rule 55(c)." Brandt, 653 F.3d at 1111. In Bateman v. U.S. Postal Service, in
25 setting aside summary judgment pursuant to a Rule 60(b)(1) motion, the Ninth Circuit
26 found that because the attorney acted in good faith, without prejudice to the opposing
27 party, and with minimal delay or impact on the judicial proceedings, his neglect was
28 excusable. 231 F.3d 1220, 1225 (9th Cir. 2000). In Bateman, the plaintiff's attorney

1 left to Nigeria because of a family emergency, aware that the defendant planned to
2 file a motion for summary judgment and that a response would be due during the
3 attorney's absence. Id. at 1222-23. The district court granted summary judgment. Id.
4 at 1223. Twelve days later, the defendant's attorney wrote a letter to the court
5 requesting that they set aside the summary judgment, which the court denied as an
6 improper 60(b) motion. Id. One month later, the attorney properly moved to set aside
7 the summary judgment under Rule 60(b)(1). Id. The Ninth Circuit, noting that the
8 attorney's reason for delay was "admittedly weak," nonetheless set aside the summary
9 judgment, finding the attorney acted with nothing "less than good faith," and that his
10 "errors resulted from negligence and carelessness, not from deviousness or
11 willfulness." Id. at 1225; see also J & J Sports Prods., Inc. v. Guest Food Serv. Corp.,
12 No. 09CV481, 2009 WL 4798883, at *2 (S.D. Cal. Dec. 8, 2009) (finding "no
13 evidence the defendant acted in bad faith or wilfully delayed his response to prejudice
14 the plaintiff" where the defendant had failed to respond due to attorney error).

15 The present case is unlike cases in which courts have found the defendant's
16 conduct to be culpable. In Franchise Holding II, LLC. v. Huntington Restaurants
17 Grp., Inc., the court entered an entry of default against the defendants in April 2002,
18 and entered a default judgment in January 2003. 375 F.3d 922, 925 (9th Cir. 2004).
19 The defendants made no attempt to respond or contest the default orders until March
20 2003, when the plaintiff began collecting upon the judgment. Id. The court found that
21 because the defendants had actual notice of both the entry of default and the default
22 judgment and failed to respond until plaintiff began to collect on the judgment, the
23 district court's denial of defendant's motion was within its discretion. Id. at 926.

24 Phix Doctor's actions here were not culpable. Its actions do not suggest an
25 "intention to take advantage of the opposing party, interfere with judicial
26 decisionmaking, or otherwise manipulate the legal process." Mesle, 615 F.3d at 1092.
27 Like the attorney in Bateman, counsel for Phix Doctor here experienced a "significant
28 personal issue" with his wife's family that "substantially affected [his] family,"
"overwhelming" counsel and putting a "strain" on his time and work. (Dkt. No. 26-2,

1 Mataele Decl. at 3-4.) Counsel's personal family issue combined with an unexpected
 2 workload caused him to miss the court deadline. (Dkt. No. 29-1, Mataele Decl. at 2-
 3 3.) As the court noted in Bateman, although this is a "weak reason for delay,"
 4 counsel's actions here suggest "negligence and carelessness, not deviousness or
 5 willfulness." 231 F.3d at 1225. Furthermore, Phix Doctor and counsel for Phix Doctor
 6 filed a motion to dismiss a few days after default had been entered, but it was rejected
 7 due to the entry of default. (Dkt. Nos. 18, 20.) Counsel further experienced technical
 8 issues accessing the CM/ECF system. (Dkt. No. 29-1, Mataele Decl. at 2-3.) These
 9 actions do not suggest an intent to "wilfully delay [the] response to prejudice the
 10 plaintiff," J & J Sports, 2009 WL 4798883, at *2.

11 Unlike the defendant in Franchise Holding II, Phix Doctor did not fail entirely
 12 to respond to the action until the plaintiff attempted to enforce a judgment. Rather,
 13 Phix Doctor's principal, Tony Gowen, attempted to file an answer and affirmative
 14 defense on behalf of Phix Doctor, but could not do so under Local Rule 83.3k,
 15 requiring an attorney to appear on behalf of a corporation. (Dkt. No. 13.) Counsel for
 16 Phix Doctor then filed the initially rejected motion to set aside default on December
 17 20, 2013, just one month after default was entered, and prior to the entry of a default
 18 judgment. (Dkt. No. 24.) Phix Doctor's conduct was not culpable.

18 **2. Meritorious Defense**

19 "A defendant seeking to vacate a default judgment must present specific facts
 20 that would constitute a defense," but "the burden on a party seeking to vacate a
 21 default judgment is not extraordinarily heavy." TCI Group, 244 F.3d at 700 (citations
 22 omitted). To satisfy the "meritorious defense" requirement, all that is necessary is to
 23 "allege sufficient facts that, if true, would constitute a defense." Mesle, 615 F.3d at
 24 1094.

25 As a defense to Wahoo's copyright infringement claims, Phix Doctor states
 26 that the term "rez" is generic, that Wahoo's trademark is not likely to be confused
 27 with Phix Doctor's product, and that it constitutes a monopoly to recognize the use
 28 as infringement. (Dkt. No. 26 at 9.) Although Wahoo contests these claims, the

question whether the factual allegation is true is not to be determined by the Court at the time it decides the motion to set aside the default. See Mesle, 615 F.3d at 1094. Rather, that question will be “the subject of the later litigation.” Id. (citations omitted). Because the burden on Phix Doctor to present facts constituting a defense is not a heavy one, TCI Group, 244 F.3d at 700, Phix Doctor has alleged sufficient facts, if true, to constitute a meritorious defense.

3. Prejudice to Plaintiff

To be prejudicial, setting aside a judgment “must result in greater harm than simply delaying resolution of the case.” TCI Group, 244 F.3d at 701 (citing Falk, 739 F.2d at 463). Rather, “the standard is whether [plaintiff’s] ability to pursue his claim will be hindered.” Id.

Here, Wahoo argues it will be prejudiced because it will incur further costs, and will be “forced to endure further delay in obtaining injunctive relief.” (Dkt. No. 28 at 12.) However, mere delay and litigation costs are not sufficient prejudice to justify refusing to set a side a default. See TCI Group, 244 F.3d at 701 (finding the Plaintiff suffered no cognizable prejudice merely by incurring costs in litigating the default). Wahoo has not established it would be prejudiced by setting aside the default judgment.

4. Condition of Setting Aside Default

Wahoo requests that if the default is set aside, it should be conditioned upon Phix Doctor’s payment of Wahoo’s costs and attorney’s fees, totaling \$10,829.00. (Dkt. No. 28 at 16.)¹ Phix Doctor argues its conduct was dissimilar to the actions of parties in cases where courts sanctioned the defaulting party, and as such, the Court should decline to award attorney’s fees and costs. (Dkt. No. 29 at 4.)

“Even where the Court finds the merits in favor of setting aside an entry of default,” the Court has discretion to condition setting aside the default “upon the payment of a sanction.” Nilsson, Robbins et al. v. Louisiana Hydrolec, 854 F.2d

¹ Wahoo also requests, without legal authority, that Phix Doctor only be permitted to file an answer to the complaint and not a motion. (Dkt. No. 28 at 16.) Accordingly, the Court denies the request.

1 1538, 1546-47 (9th Cir. 1988). By conditioning the setting aside of a default, the
 2 Court can rectify “any prejudice suffered by the non-defaulting party as a result of
 3 the default and the subsequent reopening of the litigation.” Id. at 1546. In Nilsson,
 4 the defendant had acted in “willful or deliberate disregard of discovery rules and
 5 court orders.” Id. at 1547. The district court had “lifted three entries of default,
 6 imposed four orders for money sanctions against the defendant for failure to comply
 7 with discovery requests and court orders, and held numerous hearings on motions to
 8 comply with discovery requests.” Id. By conditioning setting aside the defaults, the
 9 judge “was attempting to facilitate discovery and was protecting the non-defaulting
 10 party by not requiring the plaintiff to pay for its costs.” Id. at 1546.

11 Here, the Court finds that Phix Doctor’s actions did not constitute egregious
 12 conduct that would warrant the imposition of a sanction. Phix Doctor did not simply
 13 ignore the complaint; rather, its principal, Tony Gowen, was diligent and attempted
 14 to answer on behalf of Phix Doctor. (Dkt. No. 13.) Two days after default was
 15 entered, Defendant’s counsel attempted to file a motion to dismiss. (Dkt. No. 18.) It
 16 does not appear that counsel knew default had been entered since he had not filed an
 17 appearance. (Dkt. No. 26-2, Mataele Decl. at 4.) Furthermore, counsel for Phix
 18 Doctor then filed the initially rejected motion to set aside default just one month after
 19 default was entered, and prior to any entry of default judgment. (Dkt. No. 24.) Errors
 20 in the case appear to be based on administrative mishaps, and not any “willful or
 21 deliberate disregard of discovery rules and court orders.” Nilsson, 854 F.2d at 1547.
 22 The Court therefore finds that under the circumstances, an award of attorney’s fees
 23 and costs is not warranted. However, Counsel for Phix Doctor is warned that if he
 24 continues to miss court deadlines without seeking relief from the Court, the Court
 25 may impose sanctions in the future. Accordingly, the Court **DENIES** Wahoo’s
 26 request for attorney’s fees and costs.

26 **5. Plaintiff’s Objections**

27 Wahoo objects to various statements contained in declarations filed by
 28 Defendant. (Dkt. Nos. 31, 32.) Because the Court in reaching its decision did not rely


1 on any statements to which Plaintiff objected, the Court need not rule on the
2 objections.

3 **V. CONCLUSION**

4 For the reasons set forth above, the Court hereby **GRANTS** Defendant's
5 motion to set aside the entry of default, and **DENIES** Plaintiff's request for
6 attorney's fees and costs. Defendant shall file a responsive pleading within fourteen
7 (14) days.

8 **IT IS SO ORDERED.**

9 **DATED: March 17, 2014**

10 
11 **HON. GONZALO P. CURIEL**
12 **United States District Judge**
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28